

memorandum

CC:TL-N-8480-89

Br4:JTChalhoub

date: **SEP 08 1989**

to: District Counsel, Greensboro SE:GBO

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

This is in reply to your July 17, 1989, request for technical advice, concerning the above described cases which are scheduled for trial on [REDACTED]. This will also confirm the oral advice we gave you on or about August 10, 1989.

ISSUE

1. Where the Service issues a notice of deficiency for the I.R.C. § 6651(a)(1) and (a)(2) penalties, is the statute of limitations on assessment suspended under I.R.C. § 6503(a)(1) with respect to the portion of such penalties computed to apply to the tax reported on the delinquent return?

2. If not, what action should be taken at this time to protect the fisc?

CONCLUSIONS

1. We agree with you that although the Tax Court has jurisdiction to decide the reasonable cause issue with respect to penalties asserted under I.R.C. §§ 6651(a)(1) and (a)(2), the statute of limitations on assessment is not necessarily suspended with respect to the portion of such penalties applied to the tax reported on the delinquent returns. I.R.C. § 6662(b) excludes from the deficiency procedures, the amount of penalty under I.R.C. § 6651 that relates to the tax reported and that portion of the penalty must be paid upon notice and demand. I.R.C. § 6503(a)(1) only suspends the statute of limitations with respect to deficiencies in tax and additions to the tax attributable to deficiencies in tax.

2. We recommend that the Service make immediate assessments as follows:

I.R.C. § 6651(a)(1)

I.R.C. § 6651(a)(2)

FY [REDACTED]  
FY [REDACTED]

\$ [REDACTED]

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We further recommend that you advise taxpayer's counsel you are making such assessments, even though the amounts are included in the notice of deficiency. Counsel for the taxpayer may wish to file a motion under I.R.C. § 6213(a) to enjoin assessment and/or collection, so the motion can be heard at calendar call on [REDACTED].

#### FACTS

[REDACTED] delinquentlly filed its corporate income tax returns, Forms 1120, for the taxable years ended [REDACTED], [REDACTED], and [REDACTED]. The Memphis Service Center asserted the delinquency penalties under I.R.C. §§ 6651(a)(1) and (a)(2) and the estimated tax penalties under I.R.C. § 6655. The taxpayer paid the tax reported on the returns and the penalties asserted by the Memphis Service Center. While the returns were under examination, the taxpayer filed a claim for refund on Form 843 to recover all of the delinquency penalties and estimated tax penalties for FY [REDACTED] and FY [REDACTED]. No claim was filed with respect to FY [REDACTED] and that year is not involved in your request for litigation advice. Memphis Service Center reviewed the claims on the ground of reasonable cause for failure to file and failure to pay and refunded the delinquency penalties for FY [REDACTED] and FY [REDACTED]. It did not refund the estimated tax penalty for either year.

The revenue agent examining the returns determined deficiencies for all three tax years and disagreed with the Memphis Service Center's acceptance of the taxpayer's explanation of reasonable cause. Accordingly, the revenue agent reasserted the delinquency penalties both with respect to the amount reported on the returns and with respect to the determined deficiencies. The deficiencies for all three years have been paid. Two notices of deficiency were issued, one covering FY [REDACTED] and the other covering FY [REDACTED] and FY [REDACTED]. The deficiency notice for FY [REDACTED] properly asserts only a failure to file penalty with respect to the determined (but paid) deficiency. Thus, the Tax Court has prepayment jurisdiction and the statute of limitations on assessment is appropriately suspended under I.R.C. § 6503(a)(1) for the addition to tax for FY [REDACTED].

#### DISCUSSION

Section 6503(a)(1) provides, in relevant part, as follows:

The running of the period of limitations provided in section 6501 \*\*\* on the making of assessments \*\*\* in respect of any deficiency as defined in section 6211 \*\*\* shall (after the mailing of a notice under section

6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment \*\*\* (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

Section 6662(a) provides generally that additions to the tax for income tax delinquency and for underpayment of estimated taxes shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as the taxes upon which they are based. Section 6662(b) provides as follows:

For purposes of subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes), subsection [6662](a) shall not apply to any addition to the tax under section 6651, 6654, or 6655; except that it shall apply --

(1) in the case of an addition described in section 6651, to that portion of such addition which is attributable to a deficiency in tax described in section 6211; or

(2) to an addition described in section 6654 or 6655, if no return is filed for the taxable year.

Generically, the I.R.C. § 6651(a)(2) penalty can only apply to an "amount shown as tax" on the return by the taxpayer. On the other hand, the I.R.C. § 6651(a)(1) penalty applies to the amount "required to be shown as tax" on the return. Thus, the (a)(1) penalty also applies to a deficiency as well as it applies to the tax reported on a delinquent filed return.

When the Tax Court decided Estate of Young v. Commissioner, 81 T.C. 879 (1983), it held that it did not have jurisdiction to redetermine the addition to tax for late payment, the (a)(2) addition, because that addition is not attributable to a deficiency. That decision was specifically overruled by amendment of I.R.C. § 6214(a) to give the Tax Court jurisdiction over "any addition to the tax." Sec. 1554 of the Tax Reform Act of 1986. However, the Joint Committee Report and legislative history indicates, in relevant part, as follows:

The Act provides that the Tax Court has jurisdiction over this addition to tax for failure to pay an amount shown on the return where the Tax Court already has jurisdiction to redetermine a deficiency in tax with respect to that return.

Aside from resolving this jurisdictional issue, the provision does not alter the jurisdiction of the Tax Court. The amendment was not intended to change prior law insofar as (1) the section 6651(a)(1) late filing addition to tax, or (2) the procedure for assessing additions to tax under section 6662(b) is concerned.

Consequently, the issue here is not whether the Tax Court has jurisdiction to decide the merits of whether the (a)(1) and (a)(2) penalties can apply. We concede that it has such jurisdiction, if it otherwise has jurisdiction with respect to a deficiency. As you point out, the deliberate reference to not changing the procedure for assessing additions to tax under section 6662(b) means the Service is not protected by the notice of deficiency with respect to the portion of the penalty that is not subject to deficiency procedures. Section 6503(a)(1) suspends the statute of limitations on assessment only with respect to a deficiency.


Since the statute of limitations is not suspended with respect to the portion of the penalties attributed to the tax reported on the return, the Service is obligated to make a timely assessment before expiration of the three year period of limitations with respect to those amounts. It is problematic whether the Service could obtain a specially drafted consent along the lines of a Form 872 to extend the statute of limitations on assessment with respect to the portion of the (a)(1) and (a)(2) penalties not subject to deficiency procedures.

Under the circumstances, the taxpayer's counsel should be informed as soon as possible that the Service will assess the (a)(1) and (a)(2) penalties to the extent they apply to tax reported on the return. The taxpayer should be encouraged to file a motion under the recent amendment to I.R.C. § 6213(a) to enjoin assessment or collection of any amount included in the deficiency notice. If the taxpayer chooses to pay the assessed amounts, rather than move to enjoin assessment or collection, the taxpayer should be encouraged to amend the petition to claim an

overpayment with respect to such assessed and collected amounts. In that event, the opinion of the Tax Court in Judge v. Commissioner, 88 T.C. 1175 (1987) would seem to cover the situation.

We understand the statute of limitations on assessment will expire in early [REDACTED] with respect to the delinquently filed returns. Accordingly, those assessments should be made expeditiously. If a motion to enjoin assessment or collection is filed, any response should be routed through the National Office for review prior to filing. If you have further questions concerning this matter please call Joseph T. Chalhoub at 566-3345.

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By:   
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